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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 93-36
Tariff Filing Requirements for	)	
Nondominant Common Carriers	)	
	)	

OPPOSITION OF SPRINT TO AT&T'S APPLICATION FOR STAY

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SUMMARY

AT&T has asked the Commission to stay the rule adopted in the August 18 Order that allows nondominant carriers to file a reasonable range of rates in their tariffs. Such request should be denied. AT&T has failed to meet the four-part test for securing a stay.

AT&T argues that a stay would be useful because three parties have filed petitions for review of the August 18 Order with the D.C. Circuit and a stay merely maintains the status quo pending that review. AT&T does not really explain either the gravamen of its assertion that a stay would be useful to it, the basis for AT&T's assertion that a "stay would maintain the status quo." Such stay would presumably require the several hundred carriers now providing interexchange or access services in the market to file hundreds of tariffs, covering all of their customer deals not only for the future, but for the indeterminate past period. This flood of tariffs, which the Commission could not even begin to review, can in no way be considered to maintain the status quo. In any case, the perceived need to the party seeking a stay is not the standard upon which such stay is granted. Rather, it must demonstrate that:

- it has a substantial likelihood of prevailing on the merits of its appeal;
- it will suffer irreparable injury absent a stay;
- the issuance of a stay will not substantially harm other parties;
- the stay is in the public interest.

AT&T's argument that it has met these tests is without merit.

AT&T argues that the likelihood of success on appeal is overwhelming because a range tariff is inconsistent with the Communications Act as interpreted by the D.C. Circuit and United

States Supreme Court. AT&T, however, does not cite any decision from either Court which has interpreted the Communications Act to preclude the Commission from authorizing nondominant carriers to state in their tariffs a reasonable range of rates. Nor could it. The issue of range tariffs under the Communications Act has never before been before the D.C. Circuit or the Supreme Court.

Rather, AT&T relies upon cases arising under the Interstate Commerce Act ("ICA") in support of its position. AT&T's reliance is misplaced. As both the Commission and the Courts have emphasized, similarities in the regulatory framework established by the two Acts do not translate into an equivalency of regulatory purpose or mean that both Acts must be interpreted in an identical matter.

Similarly, AT&T's claim that it will suffer immediate and substantial harm must be viewed with a great deal of skepticism. It took AT&T nearly three weeks from the release of the August 18 Order to file its application for stay with the Commission. Such delay could hardly be attributed to the need to develop new arguments to address the findings in the August 18 Order being challenged by AT&T here. AT&T has been raising substantially the same arguments it sets forth in its Application for some time now, both before the Commission and the Courts.

Moreover, AT&T never really makes quite clear exactly how such harm would come about. For example, AT&T complains that under the differential tariffing rules for dominant and nondominant carriers, its competitors can match or undercut the rates that AT&T has filed while AT&T is often unable to ascertain what its competitors are charging. However, AT&T's rates are

presumably based upon its costs. If a competitor's costs are higher than AT&T's, it cannot match AT&T's rates without losing money. If a competitor's costs are lower than those of AT&T, there is no reason why such competitor should not be able to charge less than the amount AT&T is charging. If AT&T's costs are higher than those of its competitors, the only way AT&T could economically match or undercut would be to exploit its market power and engage in unjust discrimination. Such practice is forbidden under Section 202(a) of the Act and AT&T hardly can urge the Commission to require more tariff information from its competitors in order to facilitate AT&T's violation of the Act.

Second, there is really not much to AT&T's claim that asymmetry allows other carriers to predict future AT&T proposals with greater accuracy than AT&T can for their offerings. AT&T has now filed hundreds of different tariffs applicable to individual customers setting forth widely variant rates with no apparent logical consistency. There is no way in which AT&T's rates for a specific customer for a specific deal can be predicted with any accuracy.

Third, AT&T's claim that the failure of competitors to file tariffs has enabled them to engage in unjust discrimination is baseless. Until the advent of competition, AT&T restricted itself to less than a dozen or so generally available tariff offerings. In response to competition, AT&T now file hundreds of different tariffs applicable to a single or, at most, a few customers. AT&T has persuaded this Commission and the D.C. Circuit that all of its tariffed offerings are unlike each other. As a result, the flexibility obtained plainly strips Section

202(a) of the meaning it once had and raises a serious question of whether the Commission could ever find that unlawful discrimination exists.

Fourth, even if a nondominant carrier files the information which AT&T demands, AT&T would still lose business. This is so because the tariffing requirement do not apply after the nondominant carrier has obtained the customer's business. At such point, it would be too late for AT&T to match or undercut the published rate in an attempt to gain the customer's business.

AT&T must also show that it is suffering the type of injury cognizable under the Communications Act. AT&T does not present any argument here to support such cognizable injury. In fact, what AT&T appears to be complaining about here is the fundamental dichotomy in the Commission's regulatory treatment of dominant carriers on the one hand and nondominant carriers on the other. The fact that AT&T as a dominant carrier is required by the Commission to publish its rates, terms and conditions applicable to specific customers in greater detail than nondominant carriers is simply nonactionable against these carriers regardless of how put upon it may make AT&T feel and regardless of how much injury AT&T is reported to have suffered.

AT&T's argument that no other carrier will be harmed by a stay of the August 18 Order begs the question. It assumes that nondominant carriers are acting illegally by conforming their tariffs to rules promulgated by the Commission governing such tariffs and that because these carriers are acting illegally any burden required for them to conform their behavior to their obligation of the Act should be ignored. In any case, the stay

sought by AT&T would require massive tariff filings for hundreds of thousands of individual deals made by hundreds of carriers. For the most part, the entities involved are ill-prepared and ill-equipped to confront the problems that would result from aa requirement that all carriers file specific rate information demanded by AT&T for every single arrangement into which they have entered.

AT&T argues that a stay would be in the public interest because unless nondominant carriers are required to file the detailed rate information sought by AT&T, the Act's proscription against unreasonable and unjustly rates cannot be enforced. This argument is totally without merit. It ignores the fact that because of their lack of market power, nondominant carriers could hardly be in a position to engage in any action condemned by Sections 201(b) and 202(a). Further, the Commission has found that modification of tariff content requirements for nondominant carriers will not interfere with its ability to ensure that such carriers do not evade the Act's requirements. The Commission has also found that a reduction of tariff content for nondominant carriers will promote competition. These findings, together with the fact that a stay would place substantial burdens upon nondominant carriers which more than outweigh any purportedly illegal harm to AT&T from the continuation of such rules, demonstrates that the public interest is enhanced by the Commission's decision to reduce the tariff content requirements for nondominant carriers.

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Tariff Filing Requirements for Nondominant Common Carriers	)	CC Docket No. 93-36
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OPPOSITION OF SPRINT TO AT&T'S APPLICATION FOR STAY

Sprint Communications Company L.P. ("Sprint"), pursuant to Section 1.45(d) of the Commission's Rules (47 C.F.R. §1.45(d)) hereby opposes AT&T's application for a stay of the Commission's Memorandum Opinion and Order, FCC 93-401 released August 18, 1993 ("August 18 Order") in the above-captioned docket. AT&T is seeking a stay of the August 18 Order, pending judicial review, to the extent that such Order permits nondominant carriers the flexibility to file a reasonable range of rates in their tariffs. However, as set forth below, AT&T has failed to meet the four-part test for securing a stay and its application should be denied.

I. INTRODUCTION.

The August 18 Order was issued in the wake of the decision by the United States Court of Appeals for the District of Columbia Circuit in AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), rehearing en banc denied, January 21, 1993, cert. denied, 113 S.Ct. 3020 (1993). In that decision, the Court, inter alia, invalidated the Commission's long-standing permissive detariffing

policies adopted in CC Docket No. 79-252 (Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor) which enabled nondominant carriers subject to forbearance regulatory treatment to provide service on an off-tariff basis. The Court emphasized that it "had no quarrel with" the objectives that the Commission's permissive detariffing policies were designed to achieve (978 F.2d at 736). Nonetheless, its ruling meant that "nondominant carriers are now obligated to file tariffs with the Commission" (Notice of Proposed Rulemaking (CC Docket No. 93-36), 8 FCC Rcd 1395 (1993) ("Notice")).

The August 18 Order codified the parameters for such filings and "significantly streamlined tariff regulation for domestic nondominant carriers" (para. 1). Under such streamlined regulation, nondominant carriers are permitted "to file their interstate tariffs on not less than one day notice" (para. 21); are required to submit their complete tariffs on three and one-half inch floppy diskettes using MS DOS 5.0 and Word Perfect 5.1 software (para. 43); and, must refile their entire tariff every time they submit tariff revisions after integrating such modifications onto the diskette (id.). Moreover, nondominant carriers are afforded the flexibility to "include in their tariffs either fixed rates or a reasonable range of rates" (para. 33).

As stated, AT&T's application seeks to stay the ability of nondominant carriers to file a reasonable range of rates. In support, AT&T argues that such a stay "would be useful" because three parties (AT&T and two RBOCs, Bell Atlantic and Southwestern

Bell) have filed petitions for review of the August 18 Order with the D.C. Circuit and that "a stay will merely maintain the status quo pending that review (Application at 1).

AT&T does not really explain the gravamen of its assertion that a stay would be "useful" to it. It is even more difficult to understand the basis for AT&T's assertion that "a stay will merely retain the status quo." Although there may be disagreement at to causality and timing, it is clear, that at least partly as a result of AT&T's practice of filing separate, individual tariffs--first under Tariff 12 and then under contract tariff provisions--such individual customer pricing is by now wide-spread throughout the telecommunications industry. There are several hundred carriers providing interexchange or access service, many of whom are quite small, and many of whom provide service only through reselling the facilities of others, which--as AT&T is at pains to point out (repeatedly) in its Application--have never filed such individual customers rates and have, as a practical matter, never been required by the Commission to file such rates. The stay sought by AT&T would presumably require that each of the hundreds of carriers file hundreds, perhaps thousands of tariffs covering all of their customer deals not only for the future, but for an indeterminate past period. This flood of paper (or diskettes), which the Commission could not even begin to review, and which would, for that reason alone, serve no regulatory purpose whatsoever, can in no way be considered to maintain the status quo, pendente lite. In fact, it is difficult to conceive of a more massive shift in existing tariff practices. As AT&T is well aware, many carriers,

particularly smaller carriers and resellers, have by now undertaken to provide service in competition to AT&T, at the Commission's invitation, hardly knowing what a tariff is. Surely, it does not require much foresight to understand that, for the most part, these carriers are in no position to immediately file very single deal which they have entered into for an indeterminate past period, even assuming AT&T's unsupported and, Sprint believes largely inaccurate, claim that such an undertaking would be of utility to AT&T.

In any case, the perceived needs of the applicant is not the standard upon which a stay is granted. Rather, a party seeking a stay must demonstrate that it has a substantial likelihood of prevailing on the merits of its appeal; that it will suffer irreparable injury absent a stay; that the issuance of a stay will not substantially harm other parties; and that the stay is in the public interest (Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) quoting Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958)). Although AT&T claims that "the Commission's Order satisfies the requirements for a stay" (Application at 1), its arguments in this regard are without merit.

II. AT&T IS NOT LIKELY TO PREVAIL ON THE MERITS.

AT&T argues that its "likelihood of success on appeal is overwhelming" (Application at 5). This is so, according to AT&T, because a range tariff "is inconsistent with the Communications Act, as interpreted by the D.C. Circuit and the United States

Supreme Court" (id. at 1). AT&T, however, does not cite any decision from either Court which has interpreted the Communications Act to preclude the Commission from authorizing nondominant carriers to state in their tariffs a reasonable range of rates. Nor could it. The issue of range tariffs under the Communications Act has never been before either the D.C. Circuit or the Supreme Court.

Rather, AT&T supports its position here by citing two cases arising under the Interstate Commerce Act ("ICA"): Maislin Industries, U.S., Inc. v. Primary Steel, Inc. 110 S.Ct. 2759 (1990) ("Maislin") and Regular Common Carrier Conference v. United States, 793 F.2d 376 (D.C. Cir. 1986) ("RCCC").[1] AT&T

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[1]AT&T also states that the Interstate Commerce Commission ("ICC") in its recent decision in Range Tariffs of All Motor Common Carriers, Nos 40887, 1993 WL 293424 (I.C.C.) (August 2, 1993) "has confirmed that range tariffs are inconsistent with the ICA's ratefiling requirements...." (Application at 8 fn. 5). AT&T's characterization of the ICC's holding in this case is somewhat misleading. The ICC concluded only that "range tariffs do not meet fully the statutory disclosure requirements" (1993 WL 293424 *9, emphasis supplied) and did not "preclude the possibility that a particular individual range tariff may meet the statutory requirements" (id.). Moreover, the ICC found that "range tariffs serve a significant beneficial purpose by providing a mechanism for rapid rate changes to accommodate the spot transportation market" (1993 WL 293424 *10); proposed to allow common carriers operating in such market to keep range tariffs on file with the ICC; and required only that such carriers supplement such range tariffs by sending to the ICC via "faxsimile" rate information on the spot shipment before providing the transportation to the shipper. Presumably the rate would become effective upon receipt of the "faxsimile" by the ICC and remain in effect only as long as necessary for the common carrier to secure the business of the shipper and provide the transportation. Such procedure would hardly provide advance notice to competitors of the rate to be charged or even ensure that other shippers receive the same rate. Given the fact that AT&T claims to be injured because it alleges that a range tariff

(Footnote Continued)

argues that "[t]hese decisions authoritatively establish the invalidity of the Commission's [August 18 Order]" because they interpret the "ICA's counterparts to Sections 203(a) and 203(c) [of the Communications Act]" as not allowing for the filing of range tariffs and the "[c]ourts have repeatedly confirmed that decisions interpreting the Interstate Commerce Act are controlling for the corresponding provisions of the Communications Act, including Section 203" (Application at 8).

However, it is clear that decisions interpreting the ICA do not invariably determine the appropriate course under the Communications Act. As both the Commission and the courts have emphasized, similarities in the regulatory framework established by the two Acts do not translate into an equivalency in regulatory purpose, nor do they mean that both Acts must be interpreted in an identical manner. See, e.g., Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Further Notice of Proposed Rulemaking ("Further NPRM"), 84 F.C.C. 2d 445, 469 (1981) ("...the actual language and history of the Communications Act are primary indications of its meaning, and references to other statutes with perhaps similar language and purposes must be approached with considerable caution."); General Telephone of the Southwest v. U.S., 449 F.2d 846, 856 (5th Cir. 1971) ("...the

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(Footnote Continued)
does not provide AT&T advance notice of its competitors' charges (Application at 12-13), the ICC's proposal here--even assuming arguendo that it is relevant (see discussion below)--provides no solace to AT&T's position.

functions of the Interstate Commerce Commission...are of an entirely different nature than those of the Federal Communications Commission" and "[t]hus we are unwilling to restrict the Federal Communications Commission to a course of action which has been dictated by the requirements of the transportation industry."); AT&T v FCC, 503 F.2d 612, 617 (2nd Cir. 1974) (although "[t]here is no gainsaying" that "in drafting the Communications Act of 1934...Congress drew on the considerable body of experience gained in framing and amending the Interstate Commerce Act...the congressional intent was not to provide a carbon copy of the Interstate Commerce Act."); and Sea-land Service Inc. v. ICC, 738 F.2d 1311, 1318 n. 11 (D.C. Cir. 1984) (precedents arising under the ICA may be useful to issues before the FCC "by way of analogy only.").

In any case, as Sprint explained in its pleadings below, neither Maislin nor RCCC provides any support for AT&T's position that a reasonable range rate tariff is unlawful under the Communications Act (see Sprint's Comments at 6, fn. 4 discussing RCCC and Sprint's Reply Comments at 8-11 discussing both Maislin and RCCC). Maislin did not involve the issue of range rate tariffs or the ICC's authority under the ICA to allow such tariffs. Rather, the Supreme Court there invalidated an ICA policy under which a shipper would not have to pay the tariffed rate of the carrier in cases where the shipper and carrier had privately negotiated a lower rate; the carrier failed to file the lower rate with the ICC; but the carrier had billed the shipper and accepted payments at the lower rate (110 S.Ct. at 2763-2764). The Supreme Court found that such policy was inconsistent with

the so-called "filed rate doctrine" (110 S.Ct. at 2768). Range rate tariffs are not inconsistent with such doctrine since carriers which provide service at rates within a range are adhering to their filed tariffs.

The Court's decision in RCCC is similarly not dispositive of this case. The opinion in RCCC is based upon a close textual analysis of the relevant provisions of the ICA which are demonstrably different from those found in the Communications Act. In particular, there is no section in the ICA which is directly comparable to Section 203(b)(2) of the Communications Act and the ICC, therefore, has no power to modify the ICA's general tariff filing requirement found at 49 U.S.C. §10762(a)(1). Instead, 49 U.S.C. §10762(d)(1) only allows the ICC, in appropriate circumstances, to waive the general tariff filing requirement in 49 USC Section 10762(a)(1) (analogous to Section 203(a) of the Communications Act), but not the prohibition or rebate provision, 49 USC Section 10761(a) (analogous to Section 203 of the Communications Act). In RCCC, the Court determined that the ICC's action "...goes beyond chang[ing] the ... requirements of this section,' and nullifies other sections of the [Interstate Commerce] Act for which no waiver authority exists" (793 F.2d at 379).

The same problem does not apply in the present case. Under Section 203(b)(2) the Commission plainly has the power to modify --even modify severely--both the general tariffing provision (Section 203(a)) and the prohibition or rebate provision (Section 203(c)). Contrary to AT&T's assertion (p. 10), the Commission's power to modify both Section 203(a) and Section 203(c) are

involved here and, indeed, these two provisions are overlapping. Thus, it would be senseless for the Commission to require carriers to file specific rates under Section 203(a) and the grant them permission under Section 203(c) to charge a greater or less rate than that which appears in the tariff.

The court in RCCC recognized this overlap and found that the ICC's action was outside the parameters of its waiver authority in 49 Section 10762(d)(1) because, to find otherwise, would also nullify another section of the Act--49 USC 10761(a)--"for which no waiver authority exists." Because the Commission in the present case can modify both 203(a) and 203(c) there is no danger that the Commission here is nullifying another section of the Act over which it has no authority. Consequently, both in terms of its modification authority and the fact that such modification authority covers both 203(a) and 203(c) the Communications act is substantially different from the statute which the court construed in RCCC. The Second Circuit made this clear in rejecting a nearly identical argument by AT&T in AT&T v. FCC, 503 F.2d 612, 617 (2nd Cir. 1974) (AT&T's position that Section 203(b) confers no greater power than that granted the ICC under the ICA "is simply not so").[2]

AT&T further argues that "[t]he Commission's reliance on its Section 203(b) modification power is unsupportable" (Application

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[2]AT&T does not contend that this Second Circuit decision has been subsequently reversed or that the Court's interpretation of the Commision's modification powers under Section 203 vis-a-vis those granted the ICC under the ICA is no longer valid. In fact, AT&T does not even mention this case.

at 9); that "[n]umerous judicial decisions have recognized that the Commission's Section 203(b) power is 'restricted' and 'limited'; that it does not permit the Commission to eliminate or eviscerate the core ratefiling requirements of the Communications Act" (id.); and that "the ICC's modification power is not less than the Commission's" (id. at 11, emphasis in original).

Here again, AT&T's argument is hardly compelling. The Commission's decision to allow nondominant carriers to file a reasonable range of rates simply modifies and limits the amount of information which must be contained in the tariffs of such carriers (August 18 Order at para. 35). It does not, as AT&T contends, eliminate the ratefiling requirements of the Communications Act. Although the information which nondominant carriers are required to put in their tariffs may not be detailed enough to satisfy AT&T, none of the four cases which it cites holds that the Commission may not invoke its modification authority under Section 203(b)(2) as it has done here. On the contrary, one of the cases relied upon by AT&T--AT&T v. FCC, 487 F.2d 864, 879 (2nd Cir. 1973)--finds specifically that Section 203(b)(2) permits modifications "as to the form of, and information contained in, tariffs and the thirty day [now 120 day] notice provision." And, in another--MCI v. FCC 765 F.2d 1186 (D.C. Cir. 1985)--the court not only agreed with this finding by the Second Circuit (at 1192), it went on to "note that the Commission could further streamline the regulation of nondominant carriers without encountering any contrary congressional prescription" (at 1192). At most, the only limitations upon the Commission's modification powers which can

be gleaned from any of the four cases cited by AT&T is that the Commission may not invoke Section 203(b)(2) to limit the statutory scheme of carrier-initiated rates (AT&T v. FCC, 487 F.2d at 873) and to eliminate the tariff filing requirement in and of itself (AT&T v. FCC, 978 F.2d at 736). Neither of these limitations is implicated here.

In sum, the likelihood that AT&T will prevail on the merits of its appeal is far from "overwhelming." On the contrary, given that the Commission's decision to modify the tariff content requirements for nondominant carriers is solidly grounded upon Section 203(b)(2) of the Communications Act as interpreted by the courts, AT&T's chances of success on appeal would appear to be negligible.

III. AT&T HAS NOT SHOWN THAT IT WOULD SUFFER IRREPARABLE INJURY UNLESS A STAY WAS GRANTED.

AT&T's claim that because of the August 18 Order it "will suffer immediate, substantial, and irreparable competitive injury" (Application at 12) must be viewed with a great deal of skepticism. It took AT&T nearly 3 weeks from the release of the August 18 Order to file its application for stay with the Commission. Such delay could hardly be attributed to the need to develop new arguments to address the findings in the August 18 Order being challenged by AT&T here. AT&T has been raising substantially the same arguments it sets forth in its application for some time now, before both the Commission and the courts.

Although AT&T repeatedly asserts in its Application that it has been harmed, and appends a Declaration by one of its Directors, Howard McNally, to support such claim, it never never

really makes quite clear exactly how such harm would come about. Perhaps the most formal exposition by AT&T of its argument is found in paragraph 11 of the McNally Declaration which states

> The refusal of AT&T's competitors to file their rates and related terms and conditions has given them substantial and unfair competitive advantages over AT&T in structuring and pricing their offerings and negotiating with customers. These competitors can match or undercut the rates that AT&T has filed, while AT&T is often unable even to ascertain what they are charging. Other carriers can also predict future AT&T proposals with greater accuracy than AT&T can for their offerings. And AT&T's competitors can circumvent the requirement that all their offers be made available to similarly situated customers, because only the customers they choose to inform will be aware that a particular rate or rate structure is available.

These claims cannot withstand scrutiny. First, it is not apparent how "competitors can match or undercut the rates that AT&T has filed..." simply because competitors have become aware of these rates. AT&T's rates are presumably based upon its costs (as required by the regulatory scheme in Title II of the Communications Act). If a competitor's costs are higher than AT&T's, it cannot match AT&T's rates without losing money. Since only nondominant carriers are allowed to file range tariffs (with some minor exceptions, all of AT&T's interLATA competitors are nondominant) and since nondominant carriers are, by definition, unable to offset any such losses by raising rates to other customers, matching AT&T by pricing below costs is an uneconomic and untenable market strategy, which need be of little concern to the Commission or AT&T. On the other hand, if a competitor's costs are lower than those of AT&T, there is no reason why the

competitor should not be able to charge less than the amount AT&T is charging. This is the essence of a competitive marketplace which the Commission is obligated, and has sought so vigorously, to impose. It is true, that if AT&T had information as to its nondominant competitors' rates, AT&T could match those rates or go below them, even if AT&T's costs were higher than those of its competitors, because AT&T's remaining market power provides AT&T (by definition) with some measurable ability to discriminate against those customers who have fewer competitive alternatives. However, this practice is forbidden under Section 202(a) of the Act and AT&T can hardly urge that the Commission require tariff information from AT&T's competitors in order the facilitate AT&T's violation of the Communications Act.

Second, there really is not very much to the claim that asymmetry allows "other carriers to predict future AT&T proposals with greater accuracy than AT&T can for their offerings. AT&T has now filed hundreds of different tariffs applicable to individual customers setting forth widely variant rates with no apparent logical consistency (see, e.g., AT&T Tariff F.C.C. No. 12 and AT&T's Contract Tariffs). There is no way in which AT&T's rates to a specific customer for a specific deal can be predicted with any degree of assurance by any of AT&T's competitors given the plethora of conflicting materials that AT&T now has on file.

Third, and perhaps more galling, is AT&T's claim that the failure of its competitors to file tariffs has enabled them to engage in discrimination contrary to Section 202(a) of the Act. Essentially, basic communications service consists of the flow of electrons or photons to or from a customer's premises. Until the

advent of competition, AT&T restricted itself to less to a dozen or so generally available tariff offerings. In response to competition, AT&T has now filed hundreds of different tariffs applicable to a single or, at most, a few, customers. AT&T has persuaded this Commission and the D.C. Circuit that all of its tariffed offerings are "unlike" each other. As a result, the flexibility it has obtained plainly strips Section 202(a) of the meaning it once had and raises a serious question of whether the Commission could ever find that unlawful discrimination exits. Given the evolution of pricing in the interexchange marketplace, the insistence that all nondominant carriers must file each of their separate deals in order to insure nondiscrimination under Section 202(a) of the Act is a proposal which is totally inconsistent with reality and which comes too late from AT&T.

Fourth, even if a nondominant carrier files the very specific rate information which AT&T demands, AT&T would still lose business. This is so because a nondominant carrier would not be under any legal obligation to reflect the existence of rates for customized arrangements in its tariffs until after the negotiations with the customer had been concluded; after a definitive agreement had been entered into between the parties; and as such carrier was about to begin to provide service. At that point, the customer would have already become the customer of the nondominant carrier, and it would be far too late for AT&T to match or undercut the published rate (Application at 12-13) in an attempt to gain the customer's business. In short, the "injury" that AT&T claims--loss of customers--occurs before any tariff filing obligation arises and cannot be viewed to be "in

consequence of" a nondominant carrier's alleged failure to include the information sought by AT&T in after-the-fact tariff filings.[3]

In addition to showing that harm actually exists, AT&T must show that it is suffering the type of injury cognizable under the Communications Act. AT&T does not present any argument here to support such cognizable injury.[4] In fact, as Sprint has conclusively demonstrated in its Amicus Brief filed May 21, 1993 in the AT&T v. MCI complaint proceeding (File No. E-89-297) before the Commission[5] and in response to AT&T's lawsuit against Sprint in federal district court for the District of Columbia

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[3]AT&T complains that Sprint has continued to provide service pursuant to its maximum rate provisions despite the D.C. Circuit's ruling in AT&T v. FCC invalidating such "illegal conduct" (Application at 14; McNally Declaration at para. 10). While the reason why AT&T has raised such complaint here is by no means clear, Sprint would note that the lawfulness of Sprint's maximum rate provisions were not at issue in AT&T v. FCC. Indeed, elsewhere AT&T has insisted that issues presented by Sprint's maximum rate tariffs are fundamentally different from those that were addressed by the Court in AT&T v. FCC (Opposition of AT&T to Motion for Summary Decision filed February 18, 1992 (at 3) in AT&T's counterclaim against Sprint before the Commission in File No. E-91-63).

[4]Again, AT&T's argument here is not based upon any precedent under the Communications Act. Rather, AT&T relies upon RCCC as establishing that it is suffering a cognizable injury as a result of the Commission's August 18 Order. The language from RCCC cited by AT&T went to the issue of whether the petitioners had established that they had suffered an injury "within the zone of interests protected by the Interstate Commerce Act" (793 F.2d at 379). As discussed above, precedent interpreting the ICA cannot automatically be applied to the Communications Act and must be approached with considerable caution.

[5]Sprint incorporates here, by reference, its Amicus Brief filed in AT&T v. MCI.

(AT&T v. Sprint, CA No. 93-0295 (SSH)), AT&T has not been injured within the meaning of the Act.

AT&T alleges that it suffers an indeterminate, but nonetheless "substantial competitive injury" as result of the August 18 Order because the range rate tariffs of nondominant carriers do not provide AT&T with the type of detailed marketing information that AT&T would like to have, and consequently it has lost and will lose business to such carriers (Application at 12-13, Declaration of Howard McNally at paras. 3 and 14). In other words, AT&T complains that it has been injured because the Commission's tariff rules for nondominant carriers enable them to become more effective competitors to the dominant carrier in the long distance market. Because such increased competition to AT&T is precisely what the Commission's rules and policies are intended to promote and encourage (see, e.g., MTS/WATS Market Structure, 81 FCC 2d 177 (1980)), any resulting "injury" to AT&T in not one which is cognizable under the Communications Act.[6]

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[6]In effect, AT&T's "injury" here is indistinguishable from the "injury" AT&T allegedly suffers as a result of the constraints upon its rates or rate of return. Competition, like regulation, may constrain AT&T's profits, but such constraints--dictated by public policy--impose no cognizable injury. Sprint would also point out that elsewhere AT&T has stated that competitors are not injured by agency policies which enable a competing carrier to compete more effectively under non-predatory rates. See Brief of AT&T in MCI v. FCC, D.C. Cir. No. 89-1382 submitted June 29, 1990 at 8. AT&T does not attempt to demonstrate here that the rate ranges which have already been established by its nondominant carrier competitors are themselves predatory or will lead to the charging of predatory rates. Indeed, AT&T has never alleged--and given a nondominant carrier's lack of market power, AT&T could never establish--that its "injury" is the result of predatory rates charged by such carriers.

Further, AT&T's alleged injury is not one which Section 203 is intended to protect. The publication of rates required under Section 203 is designed (1) to enable the Commission to fulfill its statutory obligations to ensure just, reasonable and not unduly discriminatory rates, and (2) to assure customers that they pay no more than the lawful rates (Further NPRM, 84 FCC 2d at 478). There is absolutely nothing in Section 203, the Communications Act generally, or the legislative history, to suggest that the publication of rates is designed for the benefit of other carriers competing with the filing carrier either by giving them more ready access to their competitors' pricing information or by facilitating price signalling to forestall the underbidding of one another's prices. Indeed, such "benefits" are antithetical to the pro-competitive policies promulgated by the Commission. And, AT&T does not argue that rates charged by nondominant carriers pursuant to their range tariffs are (or will be) unlawful under the Act.

AT&T also does not attempt to demonstrate any causal nexus between the right of a nondominant carrier to provide service through a range tariff and the customers AT&T alleges it is losing. In fact, what AT&T appears to be complaining about here is the fundamental dichotomy in the Commission's regulatory treatment of dominant carriers on the one hand, and of nondominant carriers on the other (Application at 12, alleging that the "asymmetry" in the amount of tariff information required of dominant carriers and nondominant carriers "distorts competition and creates competitive injury"; and McNally Declaration at para. 14 complaining about the "informational

disparity between [AT&T] and its competitors."). The fact that AT&T, as a dominant carrier, is required by the Commission to publish its rates, terms and conditions applicable to specific customers in greater detail than nondominant carriers is simply not actionable against these carriers regardless how put-upon it may make AT&T feel and regardless of how much "injury" AT&T is purported to have suffered. AT&T has long been unhappy about the dichotomy in regulatory treatment of dominant and nondominant carriers. However, this dichotomy and the fact that nondominant carriers are operating pursuant to the regulatory policies applicable to them does not give AT&T a cognizable claim of injury under the Communications Act.[7]

In short, AT&T has not satisfied the second prong of the test for securing a stay. Not only has it failed to establish that it would suffer irreparable injury unless a stay were granted, it has even failed to show that it has even suffered a cognizable injury under the Communications Act.

IV. AT&T'S ARGUMENT THAT OTHER PARTIES WOULD NOT BE SUBSTANTIALLY HARMED BY A STAY OF THE AUGUST 18 ORDER IS WITHOUT MERIT.

AT&T argues that no other carrier will be harmed by a stay of the August 18 Order because the only consequence of the stay

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[7]For this reason, AT&T's claims that nondominant carriers will follow the requirements of the August 18 Order unless it is stayed (Application at 13) and that MCI has asked the district court to vacate its preliminary injunction issued against MCI in AT&T v. MCI, CA No. 93-1147 (D.D.C. July 7, 1993) on the basis of the August 18 Order (Application at 16-17) are irrelevant and do not establish that AT&T suffers "irreparable injury."